IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1942.

No. 658657

EDWARD ARMSTRONG BELLOW and McDONALD PRODUCTS CORPORATION,

Petitioners,

vs.

PARK SHERMAN CO., INC.,

Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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The petition is without merit for the following reasons:

(1) Neither of the two questions presented in the petition is material in view of the undisputed fact that the Trial Court, after full trial in open court, held the Bellow patent in suit and each of its claims invalid for want of invention over what defendant itself had for many years previously been doing, and modified by merely adding an admittedly old flexible bag containing shot to perform the

same function as in the prior art. The Trial Court also found and held that the disclosures in the pertinent prior art negatives and refutes novelty of the patent in suit and establishes want of invention; and that all of the ideas which the patentee applied to his ash tray were applied by the prior art to similar holders. Findings of Fact 8, 9, 10, 13 and 16—R. 159, 160.

The want of invention for these reasons was also clearly indicated in the language of the Trial Court, Judge Barnes, in his decision, R. 152, beginning at the bottom of page 154.

(2) The Court of Appeals unanimously affirmed on the same findings of fact—131 F. (2d) 599, R. 235. The opinion clearly discloses careful consideration of the prior art and the lack of any contribution by the patentee beyond that produced by the ordinary skilled mechanic. R. 235 at middle of page 236.

(3) This case was not decided by either the Trial Court or the Court of Appeals on the ground that the patentee "dealt with no new principles of physics" (as alleged by petitioner). The Findings of Fact and the opinion of the Trial Court and of the Court of Appeals show that the patent was held invalid for want of invention as not beyond the skill of an ordinary mechanic and for lack of novelty over the prior art. Not only does the basis of the decisions clearly appear from the findings and opinions, but the language of the opinion of the Court of Appeals clearly shows that while the phrase "no new principles of physics" was used, it was used incidentally. The opinion, after discussing the prior art, states (R. 236):

> "In view of this antiquity, it follows that, if invention exists, it must arise from the fact that the specific prescribed combination possesses novelty and utility beyond that produced by the skilled mechanic. Bellow dealt with no new principles of physics. *Rather he employed the well known expedient of an adaptable*

container partially filled with weighty material conforming to the surface upon which it is placed. This he attached to the old ash tray. Obviously the ordinary smoker who places his ash tray upon a sofa pillow solves the problem in a manner not far removed from that employed by Bellow." (Emphasis ours.)

The language of the opinion itself refutes counsel's insistence that the court had introduced a new defense in patent suits.

There is no conflict or shadow of conflict between the unanimous decisions of the Trial Court and the Court of Appeals and the decisions of this or any other Court.

No reason has been advanced why this Court should entertain jurisdiction of this case.

It is respectfully submitted that the petition for Writ of Certiorari should be denied.

RALPH M. SNYDER,
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Counsel for Respondent.